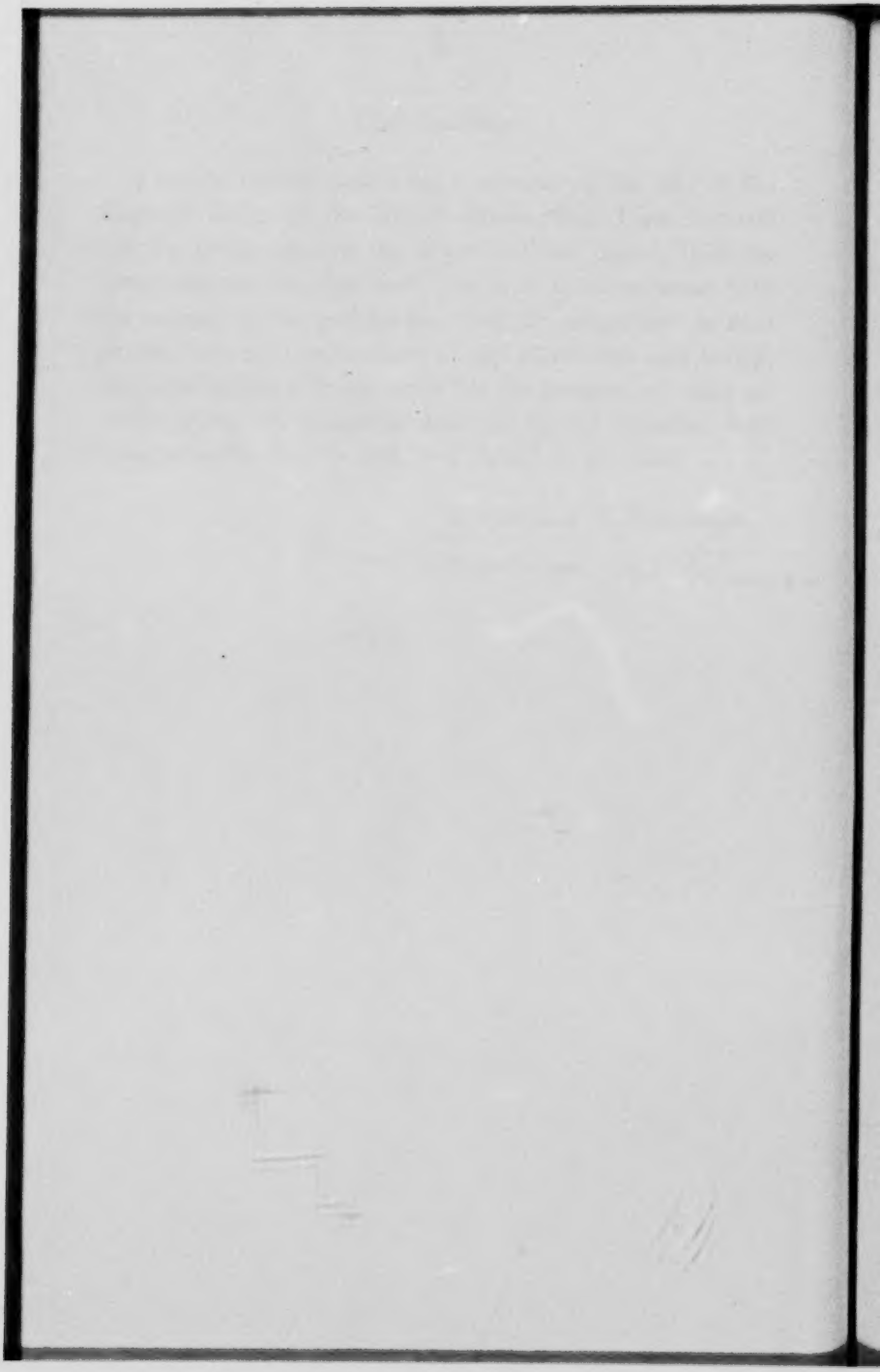

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Third Circuit (Circuit Court Judges Maris, Goodrich and Jones) by Judge Maris, was filed November 27, 1940, and reported as 115 Fed. 2d, 968.

The opinion of Judge Forman in the District Court for the District of New Jersey is printed at page 13 of Volume I of the Transcript of Record, and reported as *Central R. Co. of N. J.* v. *Martin*, 30 Fed. Supp. 41.

The findings of facts by the District Court appear at pages 76 *et seq.*, and the conclusions of law at pages 89 *et seq.* of Volume I of the Record.

Jurisdiction.

Jurisdiction of this Court to grant certiorari is invoked under Section 240 of the Judicial Code, 28 U. S. C., Sec. 347.

The judgment of the Circuit Court of Appeals was entered on November 27, 1940. A petition for rehearing was filed on January 10, 1941, within the time allowed by the Circuit Court of Appeals, and denied January 24, 1941.

Statement of the Cases.

The essential facts of these cases have been stated in the accompanying petition, and need not be repeated here.

Specification of Errors.

The errors which petitioners will urge, if the writs of certiorari be granted, are that the Circuit Court of Appeals for the Third Circuit erred:

1. In reversing the judgments of the District Court for the District of New Jersey.

2. In holding that ad valorem valuations of railroad property made without regard to the earnings thereof, and resulting in grossly excessive assessments and taxes, are not arbitrary and do not constitute a taking of property without due process of law.

3. In holding that these suits for injunctions to restrain threatened tax sales are within the purview of Section 265 of the Judicial Code which provides that "injunction shall not be granted . . . to stay proceedings in any court of a State . . ." (28 USCA., Sec. 379).

4. In holding that these suits are in effect against the State of New Jersey and therefore prohibited by the Eleventh Amendment to the Constitution of the United States.

5. In holding that the issues in these cases are *res judicata* in view of the decision of the New Jersey Supreme Court in *Central Railroad Co. etc.* v. *Martin*, 114 N. J. L., 69.

ARGUMENT.

1. A tax valuation of railroad property made with entire disregard of the earnings of the property and resulting in grossly excessive values violates the due process clause of the Fourteenth Amendment to the Constitution.

The Constitution and statutes of New Jersey require that all property in the State shall be assessed for taxation according to its "true value":

> Constitution of New Jersey, Article IV, Sec. VII, Par. 12 (1 N. J. Comp. Stat. LXXXVI);

General tax act, P. L. 1919, pp. 847, 859 (N. J. Rev. St. 1937, Sec. 54:4-1);
Railroad tax act, P. L. 1884, p. 142, 1888, p. 269 (N. J. Rev. St. 1937, Sec. 54:22-1).

Petitioners' railroad properties in New Jersey are generally the smaller sections of their railroad systems which extend into other states.

It is incontrovertible that property of this kind has peculiar characteristics and functions, and that it cannot be fairly valued unless these facts and the earning power of the properties are given due consideration and weight.

In *Nashville, C. & St. L. Railway Co.* v. *Browning*, 310 U. S. 362, this Court said:

> "That the states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others; and in making all these differentiations may **treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate**—these are among the commonplaces of taxation and of constitutional law. (Citing cases.) Since, so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another, the only question relevant for us is whether the state has done so."

The present cases involve the valuation of railroad property which by statute has been thus definitely classified and segregated for taxation. The New Jersey Court of Errors and Appeals said in *State Board, etc.* v. *Central R. Co. etc.*, 48 N. J. L. 146, 277, 278:

> "In the act under consideration the legislature has separated for taxation * * * the property of railroad and canal companies * * * used for the particular purposes of those corporations. * * * The property of such companies not used for such special purposes is left to be taxed in the same manner as other like property. The property separated * * * is, all of it, so **circumstanced by the peculiar use to which it is put as to make it on that account a class by itself.**" "The peculiarity of the property in question constitutes it a legitimate class for the purpose of taxation—a class which, in order to deal with it fairly in the matter of taxation, must be treated separately."

It is also recognized by this court as an indisputable fact that such property of a public utility corporation is necessarily an integrated property.

In *West* v. *Chesapeake & P. Tel. Co.*, 295 U. S. 662, 672, Mr. Justice Roberts wrote:

> "But it must be remembered that such a property as that here under consideration is a great integrated aggregate of many and diverse elements; is not primarily intended for sale in the market, but for devotion to the public use now and for the indefinite future; and has, **so far as its market value is concerned, no real resemblance to a bushel of wheat or a ton of iron.**"

Again, in *Continental Ill. Nat. Bank, etc.* v. *Chicago, I. R. & P. Ry. Co.*, 294 U. S. 648, 671, this court said:

> "Railway corporations * * * could not be liquidated in the ordinary way or by a distribution of assets. A railway is a unit; it cannot be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities cannot be halted because its

continuous, uninterrupted operation is necessary in the public interest."

It is a fundamental and well settled principle of law that valuation of property for purposes of taxation cannot legally be made without regard to its use.

Great Northern Ry. Co. v. *Weeks, et al.*, 297 U. S. 135, 151;
Cleveland, C. C. & St. L. Ry. Co. v. *Backus*, 154 U. S. 439;
State of Illinois v. *Illinois Central Railroad*, 27 Ill. 64, 68.

In *State Board, etc.* v. *Central R. R. Co. etc., supra*, the court said (p. 278):

> "To do justice to the companies, and in common fairness, not only must the main stem of a railroad be valued and taxed as a unit, but the other property used in connection therewith and for the same purpose **must be valued and taxed with reference to such use.** To make a just valuation thereof, property used for railroad and canal purposes must be estimated with regard to its value for such purposes—in connection with the works of which they form a part."

It was admitted on the trial of these cases[a] and found by the District Court that these assessments of railroad

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[a] The Tax Commissioner testified (R. IV, 1502):

> "If * * * a railroad is being efficiently operated then its value could be measured by the total amount of its earnings * * * unless that property could be sold *for other purposes* at a higher price than the capitalized value of its earnings. If the property would sell at a higher price *if devoted to another use* (I) consider that the true value of the property is what it would sell for to the highest bidder whether for railroad or *some other purpose.* In determining the value of railroad property (my) department

property were not made with any consideration of the definite segregation of the property as a class, or with reference to the particular use to which it is dedicated (R. I, 58), or with regard to the earnings arising therefrom (R. I, 59, 66).

The record and opinion of the District Court (R. I, 69) show that notwithstanding severe and permanent losses of traffic and earnings, which were shown by the evidence materially to reduce the actual value of the properties, the assessments for taxation for the years in question had been increased or were substantially maintained at levels grossly in excess of the true value. Based on the testimony of qualified expert witnesses produced on behalf of both petitioners (R. III, 1029, 1245), and respondents (R. IV, 1680, 1720, 1768), which was without conflict on this point, as well as controlling decisions of this Court[a], the District Court

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endeavors to determine what the property *would sell for in small parcels for a use other than that of a railroad.*" * * * "In (my) opinion the yard properties of these railroad companies have a current value dependent on *their devotion to some other use than railroad yards.* * * * There is a law in this state prohibiting a railroad company from disposing of its property without the consent of the Board of Public Utility Commissioners. The purpose of that provision is based on the public interest in adequate transportation facilities. However if the property has a greater financial use (*sic*) for some other purpose the Board must allow the railroad to use it for another purpose, sell it, or earn a return on the increased value it would have if devoted to another purpose."

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[a] In a number of cases decided by this court the principles of valuation of railway property are stated. In *Pittsburgh, etc. Ry. Co.* v. *Backus*, 154 U. S. 421, 430, the court quoted from *Franklin County* v. *Nashville, etc., Ry. Co.*, 12 Lea (Tenn.) 521, as follows:

"The value of the roadway at any given time is not the original cost, nor, *a fortiori*, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross ties, rails and spikes. The value of land depends

held that a proper valuation of railroad property could not be made for any purpose if the earning power of the property was disregarded.

The District Judge in his opinion (R. I, 68, 69), citing authorities, said:

> "These references are sufficient to convince the court that it is mandatory upon the taxing authorities to make the assessments unequivocally evince and reflect the earnings of the railroads. This does not mean that if there are no earnings there will be nothing to assess, but it does mean that the assessments should evidence the influence of earnings or lack thereof.
>
> The decrease in earnings of these properties is not temporary, but has been due to a permanent loss of traffic as a result of changes in business and transportation methods. It must be remembered that

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largely on the use to which it is put, and the character of the improvement upon it."

"The assessable value, for taxation, of a railroad track can only be determined by looking at the elements upon which the financial condition of the company depends, its traffic . . . and gross earnings in connection with its capital stock."

In *Cleveland, etc. R. Co.* v. *Backus,* 154 U. S. 439, 445, Mr. Justice Brewer said:

> "But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put."

In *Southern Ry. Co.* v. *Kentucky,* 274 U. S. 76, 81, the court took occasion to say:

> "The value of the physical elements of a railroad—whether that value be deemed actual cost, cost of reproduction new, cost of reproduction less depreciation or some other figure—is not the sole measure of or guide to its value in operation, *Smyth* v. *Ames,* 169 U. S. 566, 547."

> these railroads were built to provide transportation before the perfection of the motor-truck and the construction of the highway system. A large percentage of the traffic formerly carried solely by the railroads is now being transported by trucks, busses, etc. The rapid development of concrete state highways has resulted in the diversion to truck haulage of a vast tonnage of freight, including anthracite coal. Coal shipments have also declined because of the growing use of petroleum for fuel, which does not move by rail to any great extent. The court is further moved to take notice of the loss of export traffic. Foreign nations have increased their custom duties on American products in reprisal for the increase in the tariff on imported goods with the result that their trade has gone elsewhere. In order to reflect this deflation and diversion of business it is imperative that the earnings should permeate every item of railroad property, tangible and intangible."

And the Court concluded that the valuations here involved, made without regard to the earnings of the property, were "arbitrary, capricious, basically unsound and so grossly excessive as to amount to constructive fraud" (R. I, 91). These findings and conclusions of the trial judge were not criticized or reversed by the Circuit Court of Appeals.

In holding that these valuations were arbitrary, excessive and unconstitutional the District Court followed the decision of this Court in *Great Northern Ry. Co.* v. *Weeks,* 297 U. S. 135. The applicable portions of the opinion in that case are as follows:

> "Judicial notice must be taken of the fact that late in 1929 there occurred a great collapse of values of all classes of property—railroads, other utilities, commodities and securities, and that the depression then commenced progressively became greater. In

making assessments in that period, the board was bound to take into account and give due weight to the sudden, progressive and enormous declines of value. Changed business conditions affecting petitioner's traffic coupled with competition from new methods of transportation precluded belief that prospective improvement in petitioner's business and earnings would within a reasonable time, if ever, be sufficient to justify the assessment in question. cf. Nashville, C. & St. L. Ry. *v.* Walters, 294 U. S. 405, 423. * * * The 1929 collapse and the decline progressively following it resulted in much lower levels of prices and values which at least as early as 1933 were to be regarded not as temporary but as at least relatively permanent. Atchison, etc. Ry. Co. *v.* U. S., 284 U. S. 248, 260, 261. Los Angeles Gas Co. *v.* R. R. Comm'n., 289 U. S. 287, 311-312. * * * It clearly appears that the board failed to give reasonable weight to the falling off of petitioner's traffic, gross earnings, operating income, the extraordinary shrinkage in value of railroad properties, and the prices of commodities and securities generally. The value of petitioner's property varied with the profitableness of its use, present and prospective. Cleveland &c. Railway Co. *v.* Backus, 154 U. S. 439, 445. Southern Ry. Co. *v.* Kentucky, 274 U. S. 76, 81-82. * * * The board persistently disregarded known conditions essential to the just ascertainment of value. While the vanishing of values described by respondent's witness, and the established limitations upon rates of taxation justify diligence on the part of assessing authorities that taxable property be assessed at full value, neither these nor any other conditions warrant or excuse arbitrary or excessive valuations.

The facts * * * compel the conclusion that, by reason of changed conditions affecting value, the methods or system by which the board arrived at the 1935 value of petitioner's railway as a whole were plainly calculated to produce a grossly exces-

sive assessment of its North Dakota property for that year. That assessment being shown to have been arbitrarily made and grossly excessive, **petitioner's right to relief was not conditioned upon over assessment or upon its submission to over-taxation in 1932 or any prior year.** * * * The board's failure to consider the enormous diminution in value of petitioner's property caused by the 1929 collapse and the progress of the depression is, within the principles of our decisions, the equivalent in law of intention to make a grossly excessive assessment for 1933 in disregard of petitioner's rights under the due process clause of the Fourteenth Amendment. * * * Unquestionably, the assessment was made in plain violation of established principles that govern property valuation. Fargo *v.* Hart, 195 U. S. 490, 502; Rowley *v.* Chicago & N. W. Ry., *supra,* 109, 110; S. W. Tel. Co. *v.* Pub. Serv. Comm., 262 U. S. 679, 692; McCardle *v.* Indianapolis Co., 272 U. S. 400, 408-412; Monongahela Navigation Co. *v.* United States, 148 U. S. 312."

The Circuit Court of Appeals declined to sustain the District Judge in holding the valuations in the present cases to be unconstitutional because it considered the *Great Northern* decision on this point to have been in effect overruled in *Nashville, etc. Ry. Co.* v. *Browning,* 310 U. S. 362. We are unable, however, to find in the opinion in the latter case any expression by this Court to the effect that *Great Northern* v. *Weeks* has been overruled as an authority for a case which involves practically identical issues, and which at the same time exhibits sharp distinctions from the *Nashville* case. It seems clear, on the contrary, that the *Great Northern* case was specifically distinguished by the *Nashville* case. In the latter case this court said this:

"*Great Northern Ry. Co.* v. *Weeks,* 297 U S. 135, does not bar the way. That is the only case, and it

> was decided by a sharply divided court, in which a non-discriminatory assessment was struck down simply because it was thought excessive. Plainly, therefore, the case must have rested upon considerations peculiar to its own facts. Those are not the facts now before us."

We respectfully submit that the foregoing comment does not justify the Court of Appeals in holding that the *Great Northern* case has been discarded or overruled as an authority for the basic proposition that arbitrary disregard of essential valuation factors constitutes a denial of due process of law in assessment proceedings. Furthermore, in the *Nashville* case Mr. Justice Frankfurter pointed out that the valuations there involved had been approved by two state courts in reviewing the action of the administrative boards, and that the Supreme Court would not substitute its judgment for that of these tribunals; and he said further that "even assuming that there was an over-assessment, constitutional invalidity would not follow." This statement does not modify, but briefly summarizes what was earlier expressed by the Court in the *Great Northern* case as follows (p. 139):

> "Courts decline to disturb assessments for taxation unless shown clearly to transgress reasonable limits. Overvaluation is not of itself sufficient to warrant injunction against any part of the taxes based on the challenged assessment; mere error in judgment is not enough; there must be something that in legal effect is the equivalent of intention or fraudulent purpose to overvalue the property and to so set at naught fundamental principles that safeguard the taxpayer's rights and property."

And at pages 151, 152:

> "In cases such as this the courts are not permitted to weigh evidence of value. They may not

> substitute their opinions for the findings of assessing officers or boards but, when the jurisdiction of the District Court is properly invoked it is its duty to decide upon the merits of the taxpayer's claim that the assessment of his property was arbitrarily made and is grossly excessive."

We do not question the rule stated in both the *Great Northern* and *Nashville* cases that an assessment does not deny due process of law *merely* because it is excessive, and this is not the ground upon which we challenge the present assessments.

The essence of the decision in the *Great Northern* case is that due process of law requires that any tax assessment be made according to a method which takes into account the essential factors of value, one of which is the earnings of the railroad, relating to the period for which the valuation is made. The earnings of the road are a factor which cannot be omitted if due process of law is to prevail. The question before the Court therefore is not whether an assessment should be set aside merely because it is excessive, but whether the District Court has the power to determine that the intentional and total disregard of earnings in making an assessment of railroad property amounts to unreasonable and arbitrary action. The Court is not being asked to revise the judgment of assessing officers. Petitioners are asking it merely to say whether or not those officers can ignore a factor highly relevant to the question of value without becoming guilty of arbitrary action by reason of such omission.

There is thus presented on this point a single and perhaps a narrow question. It does not present any inquiries, as suggested by respondents, whether the assessments were made in conformity with certain provisions of the New Jersey statutes or Constitution; whether casual or sporadic

variations in the revenues of railroad property as a going concern must be given recognition year by year in making assessments; or whether the earning power of railroad property is to be taken as the *sole* determinant of an assessment valuation.

In citing the *Great Northern* case we rely upon its condemnation of a *method of assessment valuation which does not include any consideration whatsoever of the element of earnings.*

II. The judgment of the Court of Appeals is in conflict with applicable decisions of this Court and another Circuit Court of Appeals.

In the present cases the District Court determined upon the facts before it that the assessments of these properties were excessive because of the utter exclusion of earnings as an element of valuation. It is significant that nowhere in the opinion of the Circuit Court of Appeals is the factual aspect of this finding by the District Court questioned, much less reversed. The District Court's conclusion that the assessments were therefore arbitrary and unconstitutional on this ground is supported by the decision of this Court in the case of *Great Northern Ry. Co.* v. *Weeks,* 297 U. S. 135, and by the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Bailey* v. *Megan,* 102 Fed. (2d) 651. There was no issue of a like nature involved in the *Nashville* case, and the judgment therein did not criticize or question this doctrine as explained in the *Great Northern* case. The opinion of the Circuit Court of Appeals in the cases at bar, holding that the total disregard of the earnings factor is constitutionally unassailable, therefore presents, we respectfully submit, a situation of apparent conflict and confusion with existing authorities which should justify the Court in granting cer-

tiorari in order that this question, of nation-wide importance, may be fully discussed and considered.

The *Great Northern* case has been cited in a number of cases as authority for various points which were discussed in that opinion. The opinion of the Court of Appeals for the Third Circuit, which assumes that the *Great Northern* case has been in effect overruled, raises a direct conflict with the judgment of the Court of Appeals for the 8th Circuit in the case of *Bailey* v. *Megan*, 102 Fed. 2nd, 651. Judge Sanborn there said (p. 855), on the authority of *Great Northern* v. *Weeks, supra:*

> "It must be the present and potential ability of this property to earn in competition with other existing forms of transportation which is determinative of its value." (and at p. 657):
>
> "It is not credible that for the years 1933, 1934 and 1935 the value of the railroad remained constant while its earnings and security values were decreasing each year. The truth, of course, seems fairly obvious. The state needed the taxes. The taxing authorities held up the assessed valuations regardless of changing conditions. They 'persistently disregarded known conditions essential to the just ascertainment of value.' "

What was said in the foregoing opinion is particularly pertinent to the other phase of arbitrariness already mentioned, *i. e.,* the refusal of the assessor to give recognition to the fact that the property in question has a definite and recognized character and function which necessarily affect its earnings and value.

According to his own testimony, the State Tax Commissioner disregarded the earnings of these railroads primarily because he believed their property would be worth more than indicated by such a yardstick if it were regarded and treated as removed from its classification and put to

some other use which would produce earnings sufficient to sustain his preconception of value. This is, in effect, to deny that this is railroad property. Furthermore, the whole theory of the Tax Commissioner's method of appraisal of lands used for railroad purposes constitutes a serious *non sequitur*. A large factor in the valuation of adjacent non-railroad property, particularly in the terminal areas of New Jersey, is its accessibility and proximity to the railroad. If the railroad were abandoned, the value of the non-railroad adjacent lands would greatly diminish; nevertheless, the Tax Commissioner indulges in the fictitious assumption of railroad abandonment, but at the same time uses as a yardstick a level of values that would not survive the abandonment of the railroad.

Obviously, however, the earnings which constitute a vital factor of valuation are the earnings from the use of the property as a railroad. Such use must be regarded as relatively permanent (*Continental Ill. Nat. Bank.* v. *Chicago, etc. Ry. Co.*, 294 U. S. 648, 671) and not one that can be abandoned by the owner at will in order to engage in a more profitable business. If due process of law requires that the earnings of railroad property be considered and applied in placing a value on it, it does not seem like a colorable compliance with this fundamental right to establish values dependent on non-railroad uses.

III. The instant cases are sharply distinguishable from the case of *Nashville, etc. R. Co.* v. *Browning*, 310 U. S. 362.

We also submit that the Court of Appeals was in error in holding, as a ground of decision, that the instant cases are "indistinguishable" from the *Nashville* case. This conclusion overlooks entirely our basic complaint, and the finding of the trial judge (which was not criticized), that

in the valuation of our properties the earnings and the earning power were altogether ignored and disregarded. This was not a complaint or an issue in the *Nashville* case. Our study of the record and opinions in that case brings to light the fact, which the Court doubtless found to be an important one, that the assessments there reviewed had been reduced from $26,000,000 in 1930 to $17,000,000 for 1932-3, and to $16,223,194 for 1938-9, and that the latest valuations (showing a cumulative reduction of 37.6%) were arrived at, as stated by the court below, with due regard to the earnings of recent years in order that the valuations would reflect current conditions.[a] *The opinions of this court and the state court do not disclose that the case involved any willful disregard or subordination of known principles of valuation,* but rather reveal a difference of opinion as to the results of actually applying such principles. This also appears from the petition for *certiorari,* which states that the valuation complained of "purports to rest upon the financial structure and operating results of the property".

As illustrative of the striking contrast presented by these cases to the facts in the *Nashville* case we respectfully call the Court's notice to the case of the petitioner New Jersey and New York Railroad Company (now in trusteeship), which operated one of the smaller lines involved in this controversy. As shown in the opinion of the

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[a] The Supreme Court of Tennessee, 140 S. W. (2d) 781, in the *Nashville* case, said upon this point (p. 784):

> "The statement of average income was considered by the Commission, as is shown by the following statement of one of the Commissioners made on the argument before them, ' * * * to see what the trend was, whether the trend was upward or downward with the company, as justification for reducing or raising the assessment, so that was largely the purpose of having that in the brief, was what I thought.' Greater weight was given to the most recent figures 'to judge present day conditions'."

Trial Court (R. I, 53) the valuation of this small line was increased from $851,714 in 1926 to $1,290,552 in 1936, although during that period the gross revenues dropped about 50% from $1,626,065 to $828,269. Here is clearly illustrated the distinction between mere overvaluation or liberal appraisal and willful disregard of essential valuation factors. No one having regard for the meaning of money or value expressed in terms of money could conceivably mistake the shrinking revenues of this railroad as evidence of increasing value of the property.

We therefore respectfully urge that these cases do not present a situation like the *Nashville* case of merely different conclusions of value based on the same set of facts, but fundamental error in concept of value which fully justifies the characterization of these assessments by Judge Forman as "arbitrary and capricious", and therefore violative of the constitutional guarantees.

IV. Section 265 of the Judicial Code (USCA Sec. 379) does not apply to these actions.

The section reads as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State except in cases * * * relating to proceedings in bankruptcy."

As pointed out in *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 182, this provision had been in force for more than one hundred years, and its meaning and scope are well understood. It was there stated that the section was intended to give effect to a "familiar rule of comity, and like that rule, is limited in its operation." *In re Walker Grain Co.*, 294 Fed. 951, it was held that by this section Con-

gress merely wrote what had been found to be "good manners and necessary," and in *Pacific T. & T. Co.*, 2 Fed. (2nd) 151, that the section was inspired to avoid "unseemly conflict between two courts whose jurisdiction may embrace the same persons and property."

In the present cases, when the Board of Tax Appeals had affirmed the assessments, and before any action or proceeding was instituted to obtain a judicial review and adjudication thereof, the Attorney General notified the petitioners that he was about to take action to collect the unpaid portions of the taxes by sale of the properties. Such a sale could not be made, however, except after filing in the Supreme Court certain certificates of the Tax Commissioner and State Comptroller, which, on an order of a state judge, would have the effect of a judgment (N. J. Rev. St. 1937, Sec. 54:28). Before the Attorney General took any of these steps (except to notify petitioners of his purpose), the petitioners filed these suits to have the assessments declared invalid, and to restrain the defendants from proceeding to sell the properties pending the judgment of the court on such issue.

Under the state statute cited the single judge who might make the order to record the certificates was without any power to consider or adjudicate the validity of the valuations or taxes. The act provides (Sec. 54:26-13):

> "In any suit or proceeding, except on such complaint before the state board of tax appeals or on such certiorari, the certificate and report of the state tax commissioner shall be conclusive and the proceedings whereon such certificate and report are founded, **shall not be inquired into.**"

No conflict of jurisdiction therefore is suggested or indicated between the state judge, who would perform the indi-

cated ministerial act, and the Federal Court, which under the bills of complaint was called upon to adjudicate certain issues of fact and constitutional law respecting the lawfulness of the assessments.

As was said in *Western Union T. Co.* v. *Myatt,* 98 Fed. 335, proceedings before a court which cannot lawfully exercise judicial functions are not within the meaning of the section, and it is competent for a court of the United States to determine whether the board or body before whom the proceedings are pending is in fact and in law a court. In the instant suits, when they were commenced not only was there nothing pending before a state judge, but if the matter of signing such order should have been brought before him, he had nothing to consider or adjudicate, except probably the question of whether the certificates to be submitted were in proper form to be made a record of the court. That proceedings which are ministerial, rather than judicial in character, may be enjoined is amply sustained by the cases.

Prentis v. *Atlantic Coast Line,* 211 U. S. 210;
Mississippi, etc. Com. v. *Ill. Cent. Ry Co.,* 203 U. S. 335;
Southern Ry. Co. v. *Greensboro, etc. Co.,* 202 U. S. 543.

Our position is that the Circuit Court of Appeals fell into error in viewing the threatened sale which the District Court restrained as the same as, or similar to, proceedings for sale or other execution *supplemental to a judicial judgment.* There, the supplemental steps partake of the nature of the main judicial proceedings, of which they are merely an adjunct; whereas, here, the threatened sale was wholly unrelated to any preceding or dominant judicial proceed-

ings. It was nothing other nor more than the threatened consummation or execution of the administrative act of tax assessment.

V. The suits are not against the State of New Jersey within the purview of the Eleventh Amendment.

In *Central R. Co., etc.* v. *State Board of Assessors,* 49 N. J. L. 1, 4, Mr. Justice Beasley observed that the state constitution requires property to be assessed at true value, and that if the Legislature had authorized it to be assessed otherwise, such direction would be nugatory.

None of the defendants in his official capacity has therefore any implied or express authority to levy or attempt the collection of taxes based on unlawful valuations, and hence any such act or acts in pursuance thereof are not deemed to be those of the state itself.

In *Reagan* v. *Farmers Loan & T. Co.,* 154 U. S. 362, 399, Mr. Justice Brewer said:

> "It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no state can deny to the individual, forbids legislation in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government with its constitutional limi-

> tations and guarantees, the forms of law and machinery of government with all of their reaching and power must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

It is not necessary to quote from the opinion of in *Ex parte Young,* 209 U. S. 123, 130, holding that the immunity of a state from suit does not extend to a state officer who attempts to act outside of his limited authority, or pursuant to an invalid law.

The bill in each of these cases shows that the defendants are "individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings" to enforce against the parties affected certain taxes based on unconstitutional assessments. In *Looney* v. *Crane,* 245 U. S. 178, and in *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 245-47, the Supreme Court held that the cases of suits against a state within the meaning of the Eleventh Amendment "have no bearing upon the power of this court to protect rights secured by the Federal Constitution." This decision was not overruled in *Worcester Trust Co.* v. *Riley,* 302 U. S. 292, for, in commenting on the section under consideration, it was there expressly stated:

> "Unlike that in *Ex parte Young,* 209 U. S. 123, and in many cases which have followed it, the present suit is not founded on the asserted unconstitutionality of any state statute and the consequent want of lawful authority for official action taken under it."

The principle applies equally to a case where a valid statute is overstepped, for as stated in the *Reagan* case (*supra*) page 390:

> "Nor will the constitutionality of the statute, if that be conceded, avail to oust the Federal Court of jurisdiction. A valid law may be wrongfully administered by officers of the state and so as to make such an administration an illegal burden and exaction upon the individual. A tax law as it leaves the legislative hands, may not be obnoxious to any challenge and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual."

The *Worcester* case (*supra*) involved only the question of the liability of certain property to inheritance taxes under a state statute, and the court pointed out that that question could be adjudicated only after the taxing officials had initiated a proceeding looking to an assessment, and that a suit to prevent such steps from being taken was in effect a suit against the state. The cases at bar do not present claims for exemption from taxation and do not seek to prevent the defendants from assessing plaintiffs' properties at true value and levying taxes thereon. What was complained of was, as stated by Mr. Justice Brewer in the *Reagan* case (*supra*), the threat of the defendants to deprive plaintiffs of their property under a pretext of lawful authority, but "the forms of law and machinery of government with all of their reaching and power must in their actual workings stop on the hither side of the unnecessary and uncompensated taking * * * of private property," and the maintenance of these principles is within the power and duty of the judicial branch of the government, and not prohibited by the Eleventh Amendment.

In its ruling on this point as well as on the question of the applicability of Section 265 of the Code, the Circuit Court of Appeals appears altogether to have overlooked the proposition that, if its position is sound, then counsel

and Court in *Rowley* v. *Chicago & N. W. Ry. Co.*, 293 U. S. 102, and *Great Northern Ry. Co.* v. *Weeks*, 297 U. S. 135, completely ignored these fundamental barriers to Federal jurisdiction.

VI. The issues are not *res adjudicata.*

When these railroad properties were assessed for taxation for the tax year 1933 (based on valuations as of the end of the calendar year 1931) the petitioners sought relief at the hands of the Board of Tax Appeals and, failing there, obtained writs of certiorari from the state supreme court. That court reviewed the record made before the Board and dismissed the writs. In its opinion (*Central R. Co. et al.* v. *Martin*, 114 N. J. L. 69) the court discussed the contentions of the railroad companies and the arguments on behalf of the tax authorities and said:

> "Neither the contentions of the prosecutors nor the answer of the respondents, as stated, is determinative of the *real issue* * * * *were the properties assessed at their true value* for taxation purposes?"

Here by the specific language of the Court it is seen that the main issue in the case was the dollar amount of the assessments for that particular year. The prosecutors had the burden of proving their complaint that the assessments were excessive. The Court held that they failed to sustain that burden. It pointed out, however, that in a trial involving the question of taxable value of railroad property all of the circumstances surrounding the property should be examined; quoting from the opinion in *Rawley* v. *Chicago etc. R. Co.*, 293 U. S. 102, as follows:

> "Facts of great variety and number, estimates that are exact and those that are approximations, fore-

> casts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent * * * the actual value * * * of the property."

The Court then proceeded:

> "Thus it is obvious that there is no one and only yardstick of measurement that is used *under all circumstances* * * *. If we are at all concerned with the method or formulas * * * employed (by the Board) *so long as the sum it declared to be due is based on the true value of prosecutors' properties* * * * we are of the opinion that the methods employed and factors considered were fairly inclusive * * * (and) form *under the proofs submitted,* a practical, sound, fair and legal basis *for the result reached."* (Italics ours.)

In considering the effect of the foregoing opinion it must be noted, as shown by the record in the cases now before the Court, that the earnings of most of the complaining railroad companies during the year 1931, which was the period to which the assessments related, were nearly twice or more than twice as much as they were during the three years involved in the present controversy (R. I, 83 *et seq.*). Under the foregoing opinion these are some of the "facts of great variety and number" that would have to be taken into account in determining the value of the property at other times. As it is plain that the judgment of the state court in the foregoing case was based on "the proofs submitted" *in that case,* and there was no ruling excluding any pertinent or relevant facts as evidence, the judgment cannot be regarded as *res judicata* with respect to controversies involving subsequent valuations. The decisions of the New Jersey Courts hold that subse-

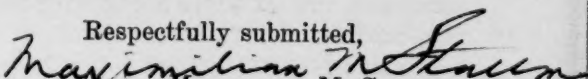
quent assessments present new causes of action (*United N. J. R. R. Co.* v. *State Board,* 101 N. J. L. 30), and we submit that the District Court was legally right in applying the decision in *Cromwell* v. *County of Sac,* 94 U. S. 351, 352, in holding that the present cases presented new and different issues from the one involved in the earlier case, and that the principle of *res judicata* did not apply. Therein the Court observed:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action, between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose, * * *.
>
> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Conclusion.

On the basis of the foregoing, the petitioners pray for the allowance of writs of certiorari. In addition, counsel are impelled to refer to the intrinsic importance of this litigation. The enormous financial stake is indicated by the fact that the percentage of the tax assessments for the three years in question, of which collection was restrained by the District Court pending revaluation in accordance with law, amounts to nearly $8,000,000. Since the institution of these suits, several of the plaintiffs have been thrown into bankruptcy and it is a matter of common knowledge that two of the remaining present petitioners are without financial means to pay the full taxes here under attack. While it is recognized that these considerations are not controlling criteria in the allowance of writs, it is felt that they are not altogether irrelevant; and that in a case involving so many important and close issues of constitutional and jurisdictional law, the Court will wish to afford opportunity for full presentation, to the end that there may be an authoritative determination.

Respectfully submitted,



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